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Lessons From the Anticommons: The Economics of *New York Times Co. v. Tasini**

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I. FRAGMENTATION AND INTELLECTUAL PROPERTY: AN ANALYSIS OF *NEW YORK TIMES CO. V. TASINI*

A. Introduction

The case of *New York Times Co. v. Tasini*,¹ which the United States Supreme Court decided in June 2001, attracted media attention and involved celebrities such as filmmaker Ken Burns because it appeared to pit the rights of authors to protect their creative works against the nation's need to preserve its historical record. The plaintiffs, a group of freelance

* This Article is dedicated to the memory of Margaret B. Ševčenko, who provided us with the same invaluable editorial assistance that she gave to countless others throughout her life.

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¹ *New York Times Co. v. Tasini*, 533 U.S. 483 (2001).

writers, argued that the *New York Times* and other defendants were violating their copyright privileges by selling their works to electronic database services.² The defendants responded by arguing that finding for the plaintiffs would necessitate a wholesale purging of the electronic records, leaving holes in the nation's historical record that would be impossible to fill.³

The three courts that heard the case each responded to this dilemma differently. The United States District Court for the Southern District of New York labored mightily to avoid having to retroactively remove all unauthorized material from electronic databases, a complex and expensive undertaking, but did so by producing an opinion that required a less than intuitive interpretation of the 1976 Copyright Act.⁴ The United States Court of Appeals for the Second Circuit, opting for a more straightforward reading of the Copyright Act, reversed the lower court decision.⁵ In doing so, it placed a premium on statutory construction,⁶ raising the real possibility that the publishers wanting the copyright essentially will be unable to acquire it due to the difficulties of retroactive negotiation with a large group of freelance writers. The Supreme Court followed the appeals court's reasoning, playing down the negative ramifications in the hopes that the two competing concerns—author's rights and accessibility to information—could be reconciled through the remedy, which the Court remanded to the district court to determine.⁷

The specific situation in *Tasini* is somewhat limited, as the case only affects freelancers who wrote articles between 1990 and 1993, when publishers started including electronic rights in contracts with freelancers.⁸

² See *id.* at 508.

³ See *id.* at 519.

⁴ 17 U.S.C. § 201 (1994). For instance, the court compares § 201(c), 201(d)(1), and 201(d)(2) to point out that, working "in tandem," the three subsections create a subdivision of rights that leaves publishers with "full authority" over the subdivisions they acquire. *Tasini v. New York Times Co.*, 972 F. Supp. 804, 815 (S.D.N.Y. 1997).

⁵ *Tasini v. New York Times*, 206 F.3d 161 (2d Cir. 1999).

⁶ *Id.* at 166-68 (citing canons of statutory construction to reject the lower court's reading of § 201(c) on the grounds that it would render superfluous another provision of the Copyright Act).

⁷ *Tasini*, 533 U.S. at 519.

⁸ One amicus brief supporting affirmance of the Second Circuit decision estimated that the case affected .0036% of the 2.8 billion documents available on NEXIS. Brief of Amici Curiae Ellen Schracker et al. at 11, *New York Times Co. v. Tasini*, 533 U.S. 483 (2001) (No. 00-201). It should be noted, however, that this

Nevertheless, it usefully illustrates concepts familiar to those in the field of law and economics because the underlying tension between the publishers and freelancers replicates itself in a variety of circumstances. In fact, *Tasini* is, from the law and economic perspective, a classic anticommons situation in which asymmetric transaction costs are complicating the implementation of the easiest solution: some form of retroactive compensation to the authors for use of their work. This paper will review the *Tasini* case,⁹ explain some basic concepts in law and economics, and describe some of the emerging economic theories of property fragmentation and how they apply to this case.¹⁰ After an in-depth consideration of the Supreme Court decision,¹¹ the economic model of the anticommons will be explained and applied to this case.¹² A discussion illustrating how the principles of law and economics can provide guidance on the open question of how to craft an effective remedy for *Tasini*¹³ will lead into the final section: a consideration of the doctrine of fair use, which could have provided a solution to the anticommons dilemma in this case.¹⁴

B. Background of the Case

1. District Court

The underlying facts of the case are relatively simple. A group of freelance writers sued the *New York Times* and a few other prominent publishers for selling their works to various electronic databases such as NEXIS, which then marketed them to the public at a significant cost. The authors claimed that this practice violated their copyright rights, and, accordingly, they demanded that the publishers first acquire their permission before passing the material onto the electronic databases, thereby allowing the writers to share in the profits.¹⁵

The district court found in favor of the publishers. Section 201 of the 1976 Copyright Act allows compilers of collections of articles (such as a newspaper or magazine) to use the commissioned works in revisions of the

amounts to copyright questions concerning millions of articles. *Id.* at 25 n.20.

⁹ See *infra* notes 15-26 and accompanying text.

¹⁰ See *infra* notes 27-47 and accompanying text.

¹¹ See *infra* notes 48-75 and accompanying text.

¹² See *infra* notes 76-92 and accompanying text.

¹³ See *infra* notes 93-123 and accompanying text.

¹⁴ See *infra* notes 124-42 and accompanying text.

¹⁵ See *Tasini v. New York Times Co.*, 972 F. Supp. 804, 806 (S.D.N.Y. 1997).

original collection (e.g., a second edition of the newspaper) or in subsequent issues of the same series (such as a later edition of an encyclopedia).¹⁶ The judge ruled that the redistribution of the articles through electronic databases constituted an allowable revision of the original work, rather than an impermissible alteration or independent use, because the databases preserved the creative element of the publishers' compilation of an interesting publication each day.¹⁷ The court acknowledged that the database version does not have any of the initial formatting, photographs, or captions, and that the juxtaposition to other articles that ran in the original edition is completely lost, and yet found that it could still be considered a revision.¹⁸ In balancing the various elements, therefore, the court decided that the intellectual effort of putting together a publication, an effort readily recognized as deserving copyright protection, survived the process of putting the work in an electronic database.

By downplaying the formatting and presentation differences between a newspaper or magazine and an electronic database, the district court was able to find that licensing articles to an electronic database was simply an allowable revision of the original work. This avoided the practical difficulties that would ensue if publishers had to find all of their freelancers and obtain licenses to include their works on electronic database services. The publishers would have continued to license material to electronic database services without further compensation to the freelancers. The result would have been a net zero increase of transaction costs for the publishers but an effective denial to the writers of a share in the substantial profits derived from selling access to commercial databases.¹⁹ The district court recognized this inequity, but it argued that the problem lay with advances in technology that had rendered the revisions right, which in 1976 was seen as being of limited value, suddenly "precious" in the context of electronic dissemination.²⁰ The ultimate solution, therefore, was within the purview of Congress, rather than the courts.²¹

¹⁶ 17 U.S.C. § 201(c) (1994).

¹⁷ *Tasini*, 972 F. Supp. at 823 (noting that "selecting materials to be included in a newspaper or magazine is a highly creative endeavor. . . . Identifying 'all the news that's fit to print' is not nearly as mechanical (or noncontroversial) a task as gathering all of the phone numbers for a particular region").

¹⁸ *Id.* at 824-25.

¹⁹ *Id.* at 826.

²⁰ *Id.* at 826-27.

²¹ *Id.* at 827.

2. *Appeals Court*

The Second Circuit reversed the district court, however, holding that § 201(c) does not allow publishers to license individual copyrighted works for inclusion in electronic databases.²² The court rejected the argument that placement in a database constituted a revision, finding that it was not reasonable to find that a database, which holds tens of thousands of articles from a variety of publications, could be considered a revised version of each original publication.²³ The court explained its reasoning by applying rules of statutory construction, claiming that the three clauses of § 201(c) set the floor, middle ground, and ceiling of allowable uses of material acquired for a collective work. The “natural reading” of the “revisions” provision was to allow later editions of a newspaper, which are “somewhat altered” from the original output.²⁴ If the understanding of the term “revision” were stretched to allow inclusions in databases, the final clause—permission for inclusion in later works—would be superfluous, an interpretation that could not be “squared with basic canons of statutory construction.”²⁵ Allowing electronic dissemination would have the additional incongruous result that publishers could not sell individual hard copies of freelance articles, but they could achieve the same end indirectly by selling copies electronically with a print-out function.²⁶ Accordingly, the Second Circuit found in favor of the freelancers, prompting an appeal to the Supreme Court.

C. *The Prism of Law and Economics*

Before considering the Supreme Court decision, this paper will outline some economic models of fragmented property that will facilitate understanding of this case. The gravamen of *Tasini* is the extent to which the freelancers seconded their rights to the *New York Times* to disseminate their work. In short, the writers created a concurrent “subright” in their copyright.²⁷ The traditional structure of a property right, in which owners

²² See *Tasini v. New York Times*, 206 F.3d 161, 165 (2d Cir. 1999).

²³ *Id.* at 167. The court noted that neither side was trying to argue that a database could be considered an original collective work or a later collective work in the same series, the other two permissible later uses of materials acquired for a collective work under § 201(c). *Id.* at 166.

²⁴ *Id.* at 167.

²⁵ *Id.*

²⁶ See *id.* at 168.

²⁷ *Tasini v. New York Times Co.*, 972 F. Supp. 804, 815 (S.D.N.Y. 1997).

enjoy a "bundle of rights," breaks down when they sell off some of their rights, while retaining others. This is easily understood in terms of real property: for instance, a tract of land with an easement is subjected to the rights of two parties. The difficulties begin when one party wants to reunify the rights associated with that piece of property. This Article reviews the analytic models for understanding this situation: the Coase Theorem, the various ramifications of asymmetric transaction costs, and the increasing difficulties that ensue when fragmented property rights are held by multiple owners: veto power over the reunification, or joint use, of a resource; persistent fragmentation;²⁸ and underutilization of the property (anticommons situation). Although these models were developed for consideration of real property, they facilitate understanding of the *Tasini* case as well.

1. *Coase Theorem*

The theory of law and economics is increasingly seen as a valuable practical tool in the courtroom.²⁹ In this case, the conflict between the freelancers and the *New York Times* and NEXIS fits several standard law and economics models. For instance, the core of the problem is that the *New York Times* does not have an easy way to track down the freelancers who contributed to the paper over the last ten to fifteen years and renegotiate the terms of the article with each of them. The Coase Theorem states that if all rights are freely transferable and transaction costs are zero, an inefficient initial partitioning of property rights will not prevent an efficient final use of the resources.³⁰ Simply put, property owners would have

²⁸ In a recent paper, Francesco Parisi introduced the analogy of entropy in property law, suggesting that legal systems develop a kind of gravitational force that counteracts a natural tendency towards property fragmentation (i.e., entropy), thereby preventing property rights from becoming so splintered that use of the land is no longer economically viable. See Francesco Parisi, *Entropy in Property*, 50 AM. J. COMP. L. (forthcoming 2002).

²⁹ For instance, a concurring opinion in a recent remand by the Mississippi Supreme Court expressly recommended using Judge Learned Hand's formula to determine a coal company's liability, if any, for coal dust that settled on a rice shipment, rendering it unusable. *Comet Delta, Inc. v. Pate Stevedore Co.*, 521 So. 2d 857, 862 (Miss. 1988) (Robertson, J., concurring). Similarly, the Coase Theorem has also informed some judicial thinking. See, e.g., *In re Stotler & Co.*, 144 B.R. 385, 393 (Bankr. N.D. Ill. 1992).

³⁰ In a world of zero transaction costs, an efficient allocation of resources occurs regardless of 1) the initial allocation, or degree of fragmentation, of the legal entitlement and 2) the choice of remedies to protect the resources in question.

unlimited opportunities either to fragment or to reunify fragmented property, achieving the most efficient use of their rights. In the current case, the freelancers and the *New York Times* would simply renegotiate the terms of their original deal to allow the current practice to continue.

Once the ideal conditions of the positive Coase Theorem are relaxed, however, the efficiency of the final allocation depends on the initial division of resources. In a world of rational actors with full information, accurate estimation of the optimal final allocation and knowledge of the relative magnitude of discounted costs and benefits of property reallocation over time will determine the best initial allocation.³¹ The ex ante choice of the owners will ultimately prove efficient, thereby minimizing the undesirable effects of the positive transaction costs that would be associated with correcting a suboptimal initial allocation.³² This is reflected in the fact that the *New York Times* and other publishers have come to understand the monetary value and public benefit of electronic rights and now routinely include permission to resell freelance articles to electronic database services in their contracts with freelancers.³³ With this complete understanding of the technology and its implications, the problem of who controls the electronic rights has been negotiated out of existence. We are rather dealing with the lingering effects of earlier, uninformed choices by both parties.

Uncertainty regarding the final optimal allocation of a given property right means that the efficiency of the initial distribution of rights depends on the likelihood that it will coincide with what turns out to be the optimal final allocation and the directional costs of reallocating rights in the event of an initial mistake. If transaction costs are endogenous (i.e., they depend on the legal system, contracting parties, or the social planner), then the

Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 10 (1960).

³¹ In many cases, this might not be a difficult undertaking. The subdivision of a lot, or sale of one of the property "bundle of rights" (e.g., creation of an easement), is often beneficial, as is fragmentation of a large estate into lots that can then be developed for residential or commercial use that will benefit the community as a whole.

³² In a world with full information, rational agents would act rationally. The multiple owners would be able to optimize the use of their property, avoiding positive transaction (or transfer) costs, reaching the same ideal equilibrium that could be achieved in a world of zero transaction costs. In short, under these ideal conditions, transaction (or transfer) costs do not impede the optimal final allocation of resources because that optimal final allocation would be rationally anticipated and such a solution would be chosen from the outset.

³³ *Tasini v. New York Times Co.*, 972 F. Supp. 804, 807 n.2 (S.D.N.Y. 1997).

issue of fragmentation becomes a relevant economic, and ultimately legal, problem.

2. *Origins of Property Fragmentation*

Ontological Sources. It is not surprising that economic theories of fragmented property are germane to the *Tasini* case. Persistent property fragmentation results from two scenarios, both of which apply to this situation. First, human creative efforts often involve property rights over various material and, therefore, are by definition ontologically fragmented. Because the creation of intellectual property is by its nature decentralized, initial ownership of the various parts of a creative work is dispersed, be it in the components of a computer game (programming, graphics, music), major Hollywood film (story, script, music, special effects), or newspaper (articles, photographs, illustrations, op-ed pieces). In such cases, the scattered ownership of ideas and inventions is not the result of inefficient or irrational human choices, but is inherent to the decentralized process of human creation in a market economy. In short, it is natural that a publication that purports to deliver "all the news that's fit to print" should avail itself of the creative talents of various professionals, and that the arrangements it has with its various contributors should not be uniform.

Subsequent voluntary exchange is a weak weapon for fighting the ontological dispersion of property rights because the various property owners must contend with a range of factors that impede the unification of fragmented rights. Although the foregone synergies among the various property fragments may be obvious, multiple dispersed owners may not be able to cooperate, resulting in the monopoly pricing of the various inputs. In short, it may be quite costly to unify dispersed property, making it impossible to avoid final property allocations that are less than optimal.

Rational Choice. Property fragmentation may also result from deliberate human choice. Recent law and economics literature³⁴ points out that the initially rational choices that led to property fragmentation may not be reversed, even if the arrangement is no longer desirable, because of the strategic impediments to reunification. In economic terms, the process of property fragmentation is characterized by asymmetric transaction costs.³⁵

³⁴ See Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163 (1999); Parisi, *supra* note 28.

³⁵ For example, the original owner will be at a disadvantage in reunifying his rights into a fee simple because he will have to deal with various parties who have acquired some rights pertaining to the original parcel. This kind of difficulty arises

A single owner faces no strategic costs when deciding how to partition his property and so may subdivide his parcel, or grant easements, because giving several different parties rights to what was exclusively his land appears economically desirable at that point in time. But unlike ordinary transfers of rights from one individual to another, reunifying fragmented property rights usually involves transaction and strategic costs higher than those incurred in the original deal,³⁶ which will plague any subsequent attempt to reunify the fragmented property.³⁷ Even reversing a simple property transaction can result in monopoly pricing by the buyer-turned-seller who is trying to extract as much profit from the transaction as possible, knowing full well the value of the property to the other party. Reunifying property that has been split among multiple parties, whether from its creation or at a later time, engenders even higher costs given the increased difficulty of coordination among the parties.³⁸

These reunification costs increase monotonically depending both on the extent of fragmentations and the synergies and complementarities between the owners of the property fragments. Control by a group of non-conforming owners leads to strategic considerations that increase the transaction costs of any attempted reunification of the original property and, in their most extreme form, can eventually make the economically more efficient use impossible to arrange,³⁹ foreclosing the possibility of taking advantage of the resource at all.

3. *Entropy*

The fundamental law of entropy in property creates a one-directional bias towards increasing fragmentation. The term "entropy" refers to the

often when closely associated property rights, such as the rights to use land and to exclude others from it, are separated. Nonconformity between use and exclusion rights (and more generally, between any two complementary elements of a property right) often give rise to asymmetric transaction and strategic costs.

³⁶ See FRANCESCO PARISI ET AL., DUALITY IN PROPERTY: COMMONS AND ANTICOMMONS 14 (Univ. of Va. L. & Econ., Working Paper No. 00-16, Geo. Mason Univ. L. & Econ., Working Paper No. 00-32, 2000).

³⁷ Directional costs will be high when multiple non-conforming co-owners are faced with a range of strategic problems stemming from difficulties in coordinating their decisions vis a vis the party who wants to reunify the property. *See id.*

³⁸ *See, e.g.,* Egidi v. Town of Libertyville, 621 N.E.2d 615 (Ill. App. Ct. 1993) (remanding the case after an appeal and previous remand to get more information concerning the possible intent of one of the involved parties to abandon an easement).

³⁹ Ronald Coase came to the same conclusion concerning the law of nuisance. *See Coase, supra* note 30, at 10.

second law of thermodynamics, according to which every process that can occur spontaneously will go in one direction only and will result in a release of energy that cannot be recaptured, so that the amount of entropy, or lost energy, in the universe will continually increase. Entropy can only be avoided in the purely abstract world of zero transaction costs, where parties could without cost negotiate to the most efficient allocation of resources. The economic forces that induce entropy in property were considered above.⁴⁰ Property division creates a one-directional inertia; unlike ordinary transfers of rights from one individual to another, reunifying fragmented property rights usually involves transaction and strategic costs higher than those incurred in the original deal.⁴¹ As in the physical world, where it takes considerable additional energy to roll a rock back up a hill after it has rolled down on its own, it takes considerable financial and legal effort to unite property rights that are diffusely owned or had been previously split. Often, especially in the presence of asymmetric transaction costs or a situation in which multiple owners can prevent use of the land or, in this case, electronic publication of articles, that reunification will never take place. To continue our physical analogy, the foregone efficient use is analogous to the expenditure of energy in thermodynamics, which will also never be recouped.

4. *Application to Tasini*

Here, the *New York Times* is reluctant to reunify the de facto property rights it had in each edition of the paper, and which were split by the Supreme Court ruling, because of the large transaction costs it would face in doing so. Tracking down, and negotiating with, the hundreds of freelancers that contributed material during the period in question is a potentially daunting task. Estimates of the amount it would cost the *Times* to compensate and/or pay damages for the freelancers' material range from \$640,000 to billions of dollars.⁴² The paper understandably prefers to

⁴⁰ Heller cites the nursery rhyme of Humpty Dumpty to illustrate his point. When Humpty Dumpty is shattered into pieces, all the king's horses and all the king's men cannot re-assemble him, which stands in contrast to the ease with which he broke into pieces in the first place. See Heller, *supra* note 34, at 1169.

⁴¹ Parisi, Schulz, and Depoorter observe that even reversing a simple property transaction can result in monopoly pricing by the buyer-turned-seller; reunifying property that has been split among multiple parties engenders even higher costs given the increased difficulty of coordination among the parties. PARISI ET AL., *supra* note 36.

⁴² Felicity Barringer, *Freelancers Suing Again on Copyright*, N.Y. TIMES, July 6, 2001, at C4.

threaten to purge the electronic databases of the freelancers' material. Whether this strategy will be effective remains to be seen: Tasini has filed another lawsuit against the *New York Times* and other defendants to block this approach, demanding that the companies instead provide compensation for the work of freelance writers.⁴³

Managing property fragmentation was a major consideration in *Tasini* because the 1976 Copyright Act created the possibility of subdividing copyright rights for the express purpose of facilitating the licensing for collective works.⁴⁴ The 1906 Copyright Act only allowed copyright to vest in one party at a time; anyone who allowed their work to be used in a collection would lose the copyright completely.⁴⁵ In an effort to correct this inequity, the 1976 Copyright Act rejected the concept of unitary copyright, allowing authors to cede part of their rights to third parties for specific purposes under limited conditions.⁴⁶ All of the courts that have considered the *Tasini* case agreed that the original authors retained the right to their creative work, and all agreed that the publishers did not obtain rights to that work. Rather, the authors who allowed their work to be published yielded a "subright" to the publisher, the scope of which is very limited. At the same time, however, the publishers created their own copyright in the creative process of putting together the collective work. The gravamen of *Tasini* is therefore determining whether the distribution of authors' works electronically fits within the narrow confine of the exceptions in the 1976 Act and how the electronic format impacts the collective nature of the work, if at all.⁴⁷ Having decided that copyright can be split into constituent

⁴³ *Id.*

⁴⁴ "Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution." 17 U.S.C. § 201(c) (1994).

⁴⁵ See the discussion in *Tasini v. New York Times Co.*, 972 F. Supp. 804, 815 (S.D.N.Y. 1997). The provisions of the 1976 Copyright Act were designed to avoid that outcome. See 17 U.S.C. § 201(c).

⁴⁶ The relevant section of the Copyright Act of 1976 reads:

Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.

17 U.S.C. § 201(c).

⁴⁷ "The determinative issue here, then, is the precise scope of these 'privileges.'" *Tasini*, 972 F. Supp. at 814.

parts, the courts are now working to avoid the problems associated with fragmentation of physical property, as outlined above. They are doing this by interpreting the ceded rights very narrowly; some dispute arises when (1) narrow construction could be seen as taking away the publishers' rights and (2) a new cost (negative externality) is created, in this case the reduction of accessibility to information.

II. THE SUPREME COURT DECISION

A. *Opinion*

The Supreme Court wrestled with the objective outlined in this Article—forestalling property fragmentation—and determined by a 7-2 margin that the authors' rights must be paramount. The Supreme Court explained that the case turned on two distinct copyrights of the same material: the rights of the authors in the work itself and the rights of the publishers to the collective work, a product of the creative work of assembling the different pieces into one publication.⁴⁸ The majority decided, however, that the conversion to database format reduces the articles to individual works, rather than as contributions to a collective whole, so that to allow the publishers further control over the articles in the medium would “invade the core of the Author's exclusive rights.”⁴⁹

The Court contrasted the pre-1976 copyright position with the current legislation, noting that indivisible copyright had been abolished in the 1976 Copyright Act, and also cataloged the injustices that had led to that legislative decision.⁵⁰ Specifically, if an author allowed his work to be used in a collective work before 1976, he lost the copyright because it either passed to the publisher or would fall into the public domain.⁵¹ The Copyright Act was drafted to compensate for this inequity,⁵² striving to preserve the author's copyright and forestalling the “unqualified transfer” of rights to the owner of the collective work.⁵³ The objective was to strengthen the economic incentive to produce creative work and to ensure that if the collective work increased demand for the article, the author

⁴⁸ See *New York Times Co. v. Tasini*, 533 U.S. 483, 512 (2001).

⁴⁹ *Id.* at 516.

⁵⁰ *Id.* at 512-13.

⁵¹ *Id.* A freelance author could retain a copyright in such a case if “the article was printed with a copyright notice in the author's name.” *Id.* Publishers, however, have superior bargaining power and can refuse to print the notices. *Id.*

⁵² See *id.* at 513.

⁵³ *Id.* at 513-14.

would benefit.⁵⁴ Therefore, absent an express agreement, “the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work of the same series.”⁵⁵

The Court refused to construe the statute in such a way as to diminish an author’s exclusive rights to his material, so that only if the databases constituted a clear revision of the original collective work could the district court decision be upheld.⁵⁶ The Court was concerned that the articles in the database would appear out of context and that users are generally prompted to search for information by category rather than by date or publication, the aspects that would tie the article to the original collective work. In addition, NEXIS removes all formatting, graphics, and advertising—other characteristics that would hearken back to the original version. The Court therefore concluded that the database is no more a revision of an article than a 400-page novel is a revision of a sonnet that might be quoted in the book.⁵⁷ By distributing articles singly, the databases “invade the Authors’ exclusive rights under § 106.”⁵⁸

The Court considered whether the creative effort of putting together the collective work was sufficiently preserved once each edition of the paper was converted into electronic format. In concluding that it was not, the majority found that the collective aspect was sufficiently diluted that the copyright in the original work would trump the right in the creative process of assembling “All the News That’s Fit to Print.”⁵⁹ Accordingly, the Supreme Court upheld the decision of the Second Circuit, holding that the publishers were not covered by § 201(c) because articles in databases could be retrieved individually, completely divorced from the collective work in which they were published.⁶⁰ Therefore, the databases could not be considered “revisions,”⁶¹ and the publishers had infringed the copyrights of the writers.⁶² The Court rejected the district court’s finding that the coding and electronic tags were sufficient to preserve the essence of the collective work, and therefore the publishers could claim copyrights under the

⁵⁴ *See id.*

⁵⁵ 17 U.S.C. § 201(c) (1994).

⁵⁶ *Tasini*, 533 U.S. at 515.

⁵⁷ *Id.* at 515-16.

⁵⁸ *Id.* at 516.

⁵⁹ *Id.* at 525.

⁶⁰ *Id.* at 515-19.

⁶¹ *Id.* at 518.

⁶² *Id.* at 508-09.

"revision" portion of § 201(c).⁶³ Rather, the appeals court argument that the database collections constituted entirely new anthologies proved more persuasive.⁶⁴

In sum, the Court minimized fragmenting the right to the material by declaring that the authors' rights remained intact regardless of the narrow rights that publishers acquired to include the material in a collective work. Once the publishers acted to remove their copyright from the narrow zone of protection offered by the 1976 Act, the authors' right to the material was effectively the only one remaining.

B. Dissent

The dissent followed the lead of the district court, delving into legislative history to support a reading of the Copyright Act that avoided the problem of restricting access to the freelancers' works, rather than speculating that it simply would not arise, as did the majority.⁶⁵ The dissent broke the question down into two issues: whether the electronic versions of the collective works are "revisions" within the meaning of § 201(c) (yes)⁶⁶ and, if so, whether the electronic medium of the database "changes the equation" (no).⁶⁷ Finally, the dissent echoed the logic of the district

⁶³ *Id.* at 510.

⁶⁴ *See id.* 511-12.

⁶⁵ *See id.* at 520-31 (Stevens, J., dissenting).

⁶⁶ *See id.* at 520 (Stevens, J., dissenting). After a close examination of copyright law before 1976, the dissent quotes the legislative record to demonstrate that the primary purpose of the Act was to preserve the authors' rights to their contributions in collective works to preclude the publishers from either changing the text itself or including it in an entirely different publication. Publishing the freelancers' work in databases therefore falls within the parameters of what Congress was trying to protect, namely the preservation of the legal claim of the original authors to their work. *Id.* at 522, 527-28 (Stevens, J., dissenting). The dissent also did not see how format could be dispositive in determining whether something was a revision or not; otherwise publishing the collective work in Braille would also have to be unacceptable—clearly not the case. *Id.* at 524 (Stevens, J., dissenting). The mere act of converting a document into ASCII (an electronic text format), and thereby giving up the original page formatting, could not be the source of the problem. *See id.* (Stevens, J., dissenting).

⁶⁷ The majority found that documents in a database could not be a revision of the original work because *New York Times* articles from different editions would be co-mingled and presented out of context. *Id.* at 516-17. The dissent, however, did not see how this juxtaposition would be any different than making the two editions available in a library or storing several editions of a paper on a single spool of microfilm. The legislation is simply silent on the extent to which the material can

court by concluding that this reading of the statute may not be the only possible interpretation, but that it is nevertheless plausible and “entirely faithful to the statute’s purposes”⁶⁸ and is much more sound from a policy perspective. Copyright is essentially an attempt to capture the benefit that the public derives from a creative literary work (in economic terms, an externality) and to return that benefit to the author as a way to maintain an incentive for people to make cultural contributions.⁶⁹ It is not designed to guarantee the highest remuneration to authors, but is rather a mechanism for balancing between the need for broad public availability of art, literature, and music and finding a way to create incentives for people to produce those goods.⁷⁰

In calculating the costs to the freelancers, Justice Stevens argued that the majority’s opinion failed to take into account the oversetting benefits that freelancers, who may be less well-known, will accrue from the increased exposure their works will get from being available electronically—benefits that could even include enhancement of the value of the copyright they still hold in the work itself.⁷¹ Put against the obvious cost of having databases that are no longer comprehensive,⁷² Stevens argued that the majority was improperly ignoring the underlying object of copyright law as enshrined in the Constitution: maintenance of a balance between authorial and public rights. In this case, the public interest had been dismissed.⁷³

In his dissent, Justice Stevens dealt at length with the problem of publishers purging their databases, thereby limiting access to an important segment of the nation’s historical record.⁷⁴ The economic model for the situation in which a group of people, who cannot coordinate, limits access to an important resource is known as the tragedy of the anticommons and is described below.⁷⁵

C. *The Tragedy of the Anticommons*

The problem of the commons is well known: all members of a group have unrestricted access to a resource and cannot coordinate among

be manipulated and still be considered a revision. *Id.* at 527 (Stevens, J., dissenting).

⁶⁸ *Id.* at 527 (Stevens, J., dissenting).

⁶⁹ *Id.* at 528 (Stevens, J., dissenting).

⁷⁰ *Id.* (Stevens, J., dissenting).

⁷¹ *Id.* at 529 (Stevens, J., dissenting). *But see id.* at 514 n.6.

⁷² *Id.* at 531 (Stevens, J., dissenting).

⁷³ *See id.* at 528 (Stevens, J., dissenting).

⁷⁴ *Id.* at 528-29 (Stevens, J., dissenting).

⁷⁵ *See discussion infra* Part II.C.

themselves to manage it efficiently. The inverse, the tragedy of the anticommons, is a result of property fragmentation. In an anticommons situation, multiple owners have veto powers over the use of a resource, thereby increasing the chances that it will not be used.⁷⁶ Competition among the owners prompts exercise of exclusion rights, even if one party could use the resource to create social benefits. Just as users do not fully bear all the costs associated with using the resource in the commons situation, in the anticommons model, multiple owners do not fully internalize the cost created by the enforcement of their right to exclude others.⁷⁷ This compresses the co-owners' right of use, potentially even eliminating it. The commons and anticommons deviate from the norm in symmetric directions. "In commons situations, the right to use stretches beyond the effective right (or power) to exclude others. Conversely, in anticommons situations, the co-owners' right of use is compressed, and potentially eliminated, by an overshadowing right of exclusion held by other co-owners."⁷⁸ Put another way, in both commons and anticommons cases, "rights of use and rights of exclusion have non-conforming boundaries,"⁷⁹ which "causes a welfare loss from the foregone synergies between those complementary features of a unified property right."⁸⁰

⁷⁶ See PARISI ET AL., *supra* note 36, at 2-3; James Buchanan & Yong J. Yoon, *Symmetric Tragedies: Commons and Anticommons*, 43 J.L. & ECON. 1 (2000); Heller, *supra* note 34, at 1166.

⁷⁷ PARISI ET AL., *supra* note 36, at 2.

⁷⁸ *Id.* at 3.

⁷⁹ *Id.*

⁸⁰ *Id.* For a public policy example of anticommons, consider efforts at environmental protection through assertion of rights. The Seventh Circuit reversed a potential anticommons situation in *River Road Alliance, Inc. v. Corps of Engineers of the U.S. Army*, 764 F.2d 445 (7th Cir. 1985), in which the court lifted an injunction preventing the Army Corps of Engineers from creating a fleeting facility—essentially a parking lot for barges—in a pristine area along the banks of the Mississippi. In his decision, Judge Richard Posner agreed with the Corps' determination that the detrimental effect on the area would be purely aesthetic and therefore not significant enough to warrant a full environmental impact statement by the Army Corps of Engineers. *Id.* at 451. Such an undertaking would be long and expensive. *Id.* at 449. The majority was not willing to allow the River Alliance, joined in the suit by the State of Illinois, to exert anticommons-type exclusion rights by insisting on full implementation of the range of federal regulations and by enjoining the construction of the fleeting facility in the meantime. By attempting to assert the right to a full environmental impact statement, the plaintiffs were delaying use of the resource. *Id.* at 448. Had the defendant had fewer legal resources at its disposal than that of the United States government, that action might have been sufficient to block the construction of the barge facility.

The anticommons application in *Tasini* is clear: each of the authors now retains control over the copyright to the work that was published in the *New York Times*. The paper is currently either unwilling, or unable, to negotiate with each one of these writers for the rights, so that the information they have provided will no longer be readily available in electronic format. An important resource, therefore, will be underutilized, given the growing reliance that people are placing on immediate electronic access to information. The extent of the underutilization is a matter of dispute, as the availability of the information in hardcopy or microfilm is disputed.⁸¹ The practical result of the *Tasini* decision necessitates, in theory, that the publishers track down every freelance author since 1976 and negotiate usage rights. Not only does this in itself threaten to engender huge costs, but it would lead to asymmetric transaction costs, as the authors could certainly hold out for higher licensing fees. A database's worth (and justification of high access charges) lies in the fact that it is comprehensive. Writers would know this and therefore demand premium licensing compensation, knowing that electronic database services, such as NEXIS,

Recent legislation has given individuals the capacity to sue to prevent environmental damage, however, effectively creating a situation in which multiple parties with ownership-type rights can prevent economic use of the resource. *See, e.g.,* Endangered Species Act, 16 U.S.C. §§ 1531, 1540(g) (1994); Clean Water Act, 33 U.S.C. § 1365 (1994). Although the question of standing remains an issue for interested parties, the Supreme Court has upheld the much lowered bar established by Congress in recent environmental protection legislation. For instance, in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000), the Supreme Court granted standing to Friends of the Earth, finding that the plaintiff's voluntary avoidance of the river, because it might have been polluted by the defendant's actions, was sufficient injury to establish standing. *Id.* at 182-83. Although granting standing does not guarantee that the plaintiff will prevail in court, the liberalized standard in environmental cases increases the likelihood of anticommons outcomes because 1) private citizens concerned about the environment will be encouraged to sue and 2) smaller developers may be more apt to abandon a project than risk expensive and time-consuming litigation, and further damage payments, even if they may ultimately prevail. Therefore, new standing rules in environmental cases may well provide a range of examples of the anticommons model in the coming years.

⁸¹ For a complete discussion, compare the Burns and American Library Association ("ALA") amicus briefs submitted to the Supreme Court in this case. Brief for Amici Curiae Ken Burns et al. at 12-14, *New York Times Co. v. Tasini*, 533 U.S. 483 (2001) (No. 00-201); Brief of Amici Curiae American Library Ass'n and Ass'n of Research Libraries at 2, 13, *New York Times Co. v. Tasini*, 533 U.S. 483 (2001) (No. 00-201).

would have to comply in order to maintain their market value. The publishers have reacted swiftly to this new reality: they claim that they will be forced to delete all freelance materials from their electronic databases in order to avoid liability for lawsuits.⁸² As stated in their brief, the results could be far-reaching and devastating:

Petitioners and those similarly situated will have no alternative but to destroy any CD-ROMs that contain freelance articles and remove all freelance contributions from electronic libraries, because they obviously cannot locate and negotiate with thousands of freelance authors, their heirs and/or assigns, in the face of the "tidal wave" of lawsuits respondent Tasini has threatened and has now begun to deliver. In fact, publishers across the nation already have assembled instructions for their electronic copy licensees to begin the deletion process; but for the stay granted below and this Court's having granted certiorari, the nation's electronic archives would already have been rendered egregiously incomplete.⁸³

This stand-off could result in a stark anticommons problem, namely that the multiple ownership rights will prevent the general public from being able to access easily the information stored within the work of freelance journalists. If these resources are only available in hard copies in libraries, while similar works are available on-line, the collective information and analysis of thousands of freelance writers, including stringers, writers of op-ed pieces, and other voluntary contributors, will be underutilized. Because the authors have no way to coordinate an optimal price for the rights to their work or to negotiate in tandem with publishers, thereby creating a cost-effective mechanism for solving this problem,⁸⁴ it is likely that the availability of such resources will be limited.⁸⁵

Nor does this appear to be a fanciful argument. An array of publishing organizations submitted amicus briefs to the Supreme Court in this case portraying the drastic results if the appeals court decision were allowed to stand. For example, a brief from twenty-three publishers, including the

⁸² Christopher Stern, *Freelance Writers Fight for Share of Online Profit*, WASH. POST, Mar. 28, 2001, at E1.

⁸³ Brief for Petitioner at 49, *Tasini v. New York Times Co.*, 533 U.S. 483 (2001) (No. 00-201) (citations omitted).

⁸⁴ Some have suggested that the answer is the creation of licensing cooperatives for freelance writers. See Josh J. May, Note, *Tasini v. New York Times Co.*, 16 BERKELEY TECH. L.J. 13, 26 (2001).

⁸⁵ Indeed, a search for "Tasini" on LEXIS at the time of this writing does not produce any "hits."

Washington Post, the Newspapers Association of America, Knight-Ridder, and Gannett, warned that:

If the Second Circuit's decision stands, existing comprehensive archives will fall, and historians, researchers, scholars, journalists and society at large will no longer have meaningful access to the rough draft of the nation's history contained in back issues of the nation's newspapers and magazines. A generation of journalists, students and researchers will have to re-learn the old method of traveling to a brick-and-mortar library, if they are lucky enough to live near one that still retains paper archives of the magazines and newspapers they want to review.⁸⁶

This analysis was seconded in another brief submitted by distinguished film maker Ken Burns, historians Doris Kearns Goodwin, David McCullough, and others who fear that libraries will not have the funds to maintain both electronic and paper copies of important resources. These amici also fear that it may already be too late to reconstruct paper copies of some of the material that seemingly will have to be deleted from electronic databases since the Supreme Court did not adopt the district court's approach to this issue.⁸⁷

The counter-argument, as represented in amicus briefs to the Court and in its actual opinion, maintains that although the Second Circuit's ruling presents a challenge, careful crafting of judicial remedies, including making any relief prospective or assigning damages instead of an injunction, would both satisfy the letter of the Copyright Act and preserve the nation's historical record.⁸⁸ The extent of "damage" to the historical record is also a matter of debate, with another group of historians, led by Ellen Schrecker of Yeshiva University, arguing that researchers rely on primary sources, rather than electronic databases, which only go back about twenty years.⁸⁹

In rendering its decision, the Supreme Court did not solve the problem. We are left with a situation in which asymmetric transaction costs have created an anticommons situation that is preventing the most efficient use

⁸⁶ Brief for Amici Curiae Advance Publications, Inc. et al. at 4, *New York Times Co. v. Tasini*, 533 U.S. 483 (2001) (No. 00-201).

⁸⁷ Brief for Amici Curiae Ken Burns et al. at 12-14, *New York Times Co. v. Tasini*, 533 U.S. 483 (2001) (No. 00-201).

⁸⁸ Brief of Amici Curiae American Library Ass'n and Ass'n of Research Libraries at 2, 13, *New York Times Co. v. Tasini*, 533 U.S. 483 (2001) (No. 00-201).

⁸⁹ Brief of Amici Curiae Ellen Schrecker et al. at 10, *New York Times Co. v. Tasini*, 533 U.S. 483 (2001) (No. 00-201).

of the property. The consequences of allowing the impediments to reunification to remain in place seem very steep. Indeed, the Court itself appears to be relying on the remedy to resolve the situation. Noting that an injunction was not mandatory, it left "remedial issues open for initial airing and decision in the District Court."⁹⁰ Law and economics theory stipulates that the district court should gravitate toward the most efficient remedy at hand. It would therefore be instructive to consider how other courts have addressed anticommons problems in other contexts.

Because the appeals court's reading of the statute was more straightforward, the Court fulfilled, by a 7-2 margin, predictions that it would uphold the decision of that court.⁹¹ Although acknowledging some of the difficulties that may flow from this decision, the Court tried to avoid fulfillment of the catastrophic scenarios presented by the newspapers by remanding the case for further consideration of a remedy. The Court also remarked pointedly that injunction of use of the freelancers' material would not be the lower court's only recourse.⁹² Given that the concerns about availability of information is at least plausible, it is useful to apply the economic concepts described earlier in this section to the *Tasini* context in order to understand more fully the implications of the decision and how some of the more costly results might be avoided.

III. REMEDIES AND ENDOGENOUS TRANSACTION COSTS

Economic efficiency is explicitly cited as a basis for judicial creativity in determining the most appropriate remedies.⁹³ According to a well-known formulation of the normative Coase theorem, in the presence of transaction costs, the choice of remedial protection will have an impact on the final use of rights and resources and will influence the extent of economic dead-weight losses. Most notably, Calabresi and Melamed point out that, in the presence of positive transaction costs, the choice between property-type and liability-type remedies has important efficiency consequences.⁹⁴

⁹⁰ *New York Times Co. v. Tasini*, 533 U.S. 483 (2001).

⁹¹ See John D. Shuff & Geoffrey T. Holtz, *Copyright Tensions in the Digital Age*, 34 AKRON L. REV. 555, 562 (2001).

⁹² *Tasini*, 533 U.S. at 519.

⁹³ See, e.g., *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870 (N.Y. 1970) (opting to award damages rather than an injunction to plaintiffs complaining about pollution caused by a local cement factory).

⁹⁴ Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972). The authors outline a scheme with three kinds of entitlements: property,

A. Remedies and Asymmetric Transaction Costs

1. Theory

In the realm of entropy and property fragmentation, positive transaction costs often generate a one-directional stickiness in the transfer of legal entitlements. As discussed above, pricing externalities and holdouts are two major impediments to transfers, which are directly related to each other in the anticommons setting. The optimal legal remedy should aim at minimizing the net social cost of such externality and holdout costs in any particular institutional setting. Quite interestingly, the asymmetry may justify the selective use of different remedies for the same entitlement or relationship, as this hybrid approach is a potential instrument for correcting the asymmetric frictions encountered in the transfer of such rights. In this setting, legal rules may offer different remedial protection in two legal situations that first appear equivalent because the asymmetric strategic and transactional impediments to the transfer of such rights justify the differing treatment of apparently identical legal positions.⁹⁵ The Supreme Court in *Tasini* underlined this point by quoting language in *Campbell v. Acuff-Rose Music, Inc.* to the effect that “goals of copyright law are ‘not always best served by automatically granting injunctive relief.’”⁹⁶

This Article posits that courts and legislators, consciously or unconsciously, take the asymmetric effects of property fragmentation into

liability, and inalienable rights. The owner of a property-type entitlement can sell it at will for whatever price the market will bear; a property-type remedy, such as an order for specific performance or an injunction, can only be transferred with the owner's consent, at the price he demands. Liability-type remedies, such as damages, place control in the hands of the actor wanting the right, who can act against the will of the person who holds the entitlement, so long as he is willing to pay the price in the form of damages that are set by the state through the courts. *Id.* at 1092. Finally, certain entitlements, such as personal liberty, cannot be transferred or sold, even if the holder would want to do so. *Id.* at 1092-93. These well-known considerations have provided the basis for much of the common wisdom during the last twenty-five years in the law and economics profession. Over the same period, however, several scholars have challenged the validity of the Calabresi-Melamed framework, pointing to the limitations of liability-type protection. These critiques have led to various refinements of the original 1972 Calabresi-Melamed framework, which shall be taken into consideration in the present analysis. In spite of such challenges, however, the gist of the original proposition remains standing.

⁹⁵ See Coase, *supra* note 30, at 15.

⁹⁶ *Tasini*, 533 U.S. at 519 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 n.10 (1994)).

account when considering the best legal rules to apply in a given situation.⁹⁷ This efficiency hypothesis further predicts the emergence of a dual regime of remedies to compensate for the one-directional stickiness in the parties' exchanges in several situations related to contract and property law. When transaction costs are asymmetric, legal systems should take into consideration their "direction" (i.e., the relative cost of reallocating entitlements from one party to the other), rather than the total transaction costs faced by all of the parties.⁹⁸ This is done in order to minimize the welfare losses occasioned by such asymmetric stickiness, thus preventing the effects of entropy and persistent property fragmentation.⁹⁹

2. *Practice: Penn Central and Calumet Bank*

The approach of the Indiana legislature seems to have been guided by unequal transaction costs when it passed a statute allowing property owners

⁹⁷ This same instinct can be seen in a different setting in which the Court of Appeals for Florida's Fifth District reversed a lower court decision against a landowner who complained that he had not received sufficient notice of an issuance of a tax deed for the subsurface property rights of his land. *Cape Atl. Landowners Ass'n v. County of Volusia*, 481 So. 2d 1384 (Fla. Dist. Ct. App. 1991). The court construed the statute to show a "preference" for reunification of the fee and subsurface rights, thereby giving the fee owner "preferential treatment" in purchasing the tax certificate. The court found that just because subsurface rights could be taxed separately, that did not mean that the county did not have an obligation to provide sufficient notice so that owners could reunite the fee. The court was making every effort to prevent the anomalous result of having two parties own surface and subsurface rights, a clearly inefficient property fragmentation.

⁹⁸ In a companion case to the railroad abandonment decisions described in the following section, the Supreme Court of Indiana decided in *Consolidated Rail Corp. v. Lewellen*, 682 N.E.2d 779 (Ind. 1997), that any language in a deed limiting or describing the purpose of the transfer meant that a right of way (easement) rather than a fee simple was transferred. In an effort to promote the unification of property, the court found that the railroad had been responsible for drafting the original deeds, so that the documents would be interpreted in favor of the grantors, i.e., presuming a right of way, which would be extinguished with the railroad, rather than a fee simple, which would not.

⁹⁹ For instance, in *Calumet National Bank v. American Telephone & Telegraph Co.*, 682 N.E.2d 785 (Ind. 1997), described in greater detail below, the court interpreted the common law to mandate that property owners abutting abandoned rail lines automatically recover a fee simple from the mid-point of the railway to their property line, absent a deed stipulating that the railway had received a fee simple at the time of the original transfer of interest, thus expediting the reunification of property rights. *Id.* at 788.

to file an affidavit to reclaim land that had been used by railroads for its tracks once the Interstate Commerce Commission certified that the railroad was no longer in operation.¹⁰⁰ The idea was to avoid a situation characterized by classic asymmetric transaction costs: multiple landowners trying to reunify their property from a buyer, the railroad, now turned seller. Although the railroad held many essentially unusable strips of land, they were nonetheless highly desired by the property owners abutting the defunct railroad tracks.

The Seventh Circuit, in *Penn Central Corp. v. U.S. Railroad Vest Corp.*, struck down the statute because of procedures for its implementation, not its underlying purpose.¹⁰¹ The court clearly stated that it did not “disparage the statute’s objectives,” acknowledging that “it is desirable to eliminate clouds on title and divided ownership,”¹⁰² but held that six months was insufficient time for Penn Central to defend against owners who were trying to take land that the railroad might actually own, as opposed to land for which it had merely secured a right of way.¹⁰³ In its opinion striking down the law, the Seventh Circuit nevertheless denounced the risk of entropy and persistent fragmentation, observing:

If the railroad holds title in fee simple to a multitude of skinny strips of land now usable only by the owner of the surrounding or adjacent land, then before the strips can be put to their best use there must be expensive and time-consuming negotiation between the railroad and its neighbor—that or the gradual extinction of the railroad’s interest through the operation of adverse possession.¹⁰⁴

The Seventh Circuit therefore showed where it drew the line between facilitating the unification of property and correcting the asymmetry in transaction costs and undermining basic ownership rights. It issued an injunction against the further filing of affidavits, choosing a property-type remedy that reaffirmed Penn Central’s possible entitlement to the land, which it could then sell to the highest bidder.¹⁰⁵ The court assumed that the majority of the deeds in question were, in fact, rights of way that would dissolve upon the abandonment of the railroad, making it easier to opt to

¹⁰⁰ IND. CODE § 8-4-35-4 (1987).

¹⁰¹ *Penn Cent. Corp. v. U.S. R.R. Vest Corp.*, 955 F.2d 1158 (7th Cir. 1992).

¹⁰² *Id.* at 1163.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 1160.

¹⁰⁵ *Id.* at 1164.

defend ownership rights at the risk of high transaction costs caused by the asymmetry between the railroad and the landowners.¹⁰⁶

The court indicated, however, that the legislature had not stepped far over that line, noting that it would be "simple enough for the State of Indiana to devise a quick and cheap procedure,"¹⁰⁷ namely some kind of pre-deprivation hearing that would allow the railroad to document the acquisition of title to the property, rather than just a right of way. With this protection, the statutory mechanism could function fairly and constitutionally, while achieving its objective of eliminating the transaction costs that otherwise might hinder this socially beneficial property reunification.¹⁰⁸ The court therefore paved the way for another property-type remedy, namely vesting presumption of title in the owners of the abutting property rather than in the railroad.

Another abandoned railroad case, involving AT&T and Calumet National Bank, had a similar fact pattern, yet the Supreme Court of Indiana resolved the case using a more conventional damages approach to remedy.¹⁰⁹ In that instance, Calumet Bank, acting in its capacity as a trustee for property owners, sued AT&T for trespass for installing fiber optic cables along the railroad line that had been abandoned by Conrail.¹¹⁰ Although Conrail had purported to transfer its right of way to AT&T, its privilege to use the land had ended two years earlier when the Interstate Commerce Commission authorized it to abandon the railroad.¹¹¹ As AT&T had already set up the cable and demonstrated the public need for it,¹¹² the court found that damages were the proper remedy.¹¹³ Unburdened by considerations about asymmetric transaction costs and the ensuing one-dimensional stickiness in reunifying property rights, the court was able to resolve the dispute using a more efficient liability-type remedy. These two cases therefore provide an illustration of the hypothesis that courts will treat cases stemming from similar contexts differently depending on the direction of the transaction costs involved.

3. *Practice: Tasini*

These two cases also provide interesting guidance for the district court. The situation in *Tasini* echoes the *Calumet* case in important ways: the *New*

¹⁰⁶ *Id.* at 1159.

¹⁰⁷ *Id.* at 1163.

¹⁰⁸ *Id.*

¹⁰⁹ *Calumet Nat'l Bank v. Am. Tel. & Tel. Co.*, 682 N.E.2d 785 (Ind. 1997).

¹¹⁰ *Id.* at 787.

¹¹¹ *Id.* at 791.

¹¹² *Id.* at 787.

¹¹³ *Id.* at 792.

York Times transferred a right that it did not have to a third party, who then used it in a way that contributed to the public good, in addition to its own profitability.¹¹⁴ This parallels Conrail's transfer to AT&T of property rights that it did not have. The Supreme Court of Indiana found that damages were an appropriate way to compensate the true owners, while allowing the benefit of the cable lines to remain accessible to the public.

In the *Penn Central* case, the basic framework is the inverse of *Tasini*: multiple owners who are at risk of not being able to reunify their property rights. Nevertheless, the basic message of the court, the importance of reunifying property rights in an efficient manner, resonates here. The Seventh Circuit issued an injunction but noted that a mechanism for the adjudication of each claim would be a sufficient solution to the problem. A similar solution has been suggested in the *Tasini* case, namely the creation of a clearinghouse which would be responsible for identifying and enforcing the rights of the scattered freelance writers.¹¹⁵ In short, the district court would seem to have some roadmaps out of this dilemma at its disposal.

IV. TRANSACTION COST AND ANTICOMMONS ANALYSIS: FAIR USE AND THE SCOPE OF THE SOLUTION¹¹⁶

A. Introduction

Both sides to the *Tasini* controversy agree that finding a way to reconcile the copyright interests of the freelance authors with the preservation of the integrity of the nation's electronic historical record is an important challenge. The majority and dissenting opinions, however, reveal the limitations of relying solely on statutory construction to resolve the question. Such an approach offers the choice of a strained reading of the statute to avoid complications in preserving the country's historical record or a straightforward reading that could have unfortunate repercussions. A more creative approach, hinted at during oral argument, might have provided a better solution.

¹¹⁴ The amicus brief of Authors Guild, Inc. provides a full consideration of profit motive in this case. See Brief of Amici Curiae Authors Guild, Inc. et al. at 10, *New York Times Co. v. Tasini*, 533 U.S. 483 (2001) (No. 00-201).

¹¹⁵ Some have suggested that the answer is the creation of licensing cooperatives for free-lance writers. See, e.g., May, *supra* note 84, at 26.

¹¹⁶ The discussion in this section is adopted from Ben Depoorter & Francesco Parisi, Fair Use and Copyright Protection: A Price Theory Explanation (2001) (unpublished manuscript, on file with author), available at <http://www.gmu.edu/departments/law/faculty/papers/docs/01-03.pdf>.

During the *Tasini* oral argument, one Justice brought up the possibility of the fair use doctrine as a possible solution to what has been referred to as the Petitioners' "Chinese Cultural Revolution" argument.¹¹⁷ The Justice wanted to know what the difference would be between downloading an article from an electronic database and photocopying it in the library, essentially querying whether it would be an option to place the onus of respecting the author's copyright on the user, subject to the exceptions enunciated by the fair use doctrine.¹¹⁸ The majority brushed over this line of legal reasoning, stating that a database is a commercial venture and therefore not entitled to the exceptions given to libraries under fair use.¹¹⁹ Furthermore, the publishers did not assert a fair use defense,¹²⁰ an oversight that will be discussed below. In his dissent, Justice Stevens echoed the fair use rationale, stating that the user and purpose ultimately must be the determining factors.¹²¹ Just as someone can print out certain frames of a microfilm, he can download certain pages from an article in an electronic database; both contain various editions of publications juxtaposed together.¹²² Ultimately, the user must be responsible for not infringing copyright; violation cannot be attributed to the medium, be it paper, microfilm, or electronic database.¹²³

B. *The Relevance of the Fair Use Doctrine to Tasini*

The doctrine of fair use, codified in 17 U.S.C. § 107, allows "fair" use and reproduction of copyrighted works for purposes such as criticism, comment, news reporting, teaching, scholarship, and research.¹²⁴ A fair use,

¹¹⁷ Oral Argument Transcript at 33-34, *New York Times Co. v. Tasini*, 533 U.S. 483 (2001) (No. 00-201).

¹¹⁸ Wendy J. Gordon, *Fine-tuning Tasini: Privileges of Electronic Distribution and Reproduction*, 66 BROOK. L. REV. 473, 475-76 (2000) (arguing that publishers cannot use fair use as a defense because, even assuming a right of reproduction, they do not have the separately cognizable right to distribution).

¹¹⁹ *New York Times Co. v. Tasini*, 533 U.S. 483, 517 (2001).

¹²⁰ *Id.* at 515.

¹²¹ *Id.* at 527 (Stevens, J., dissenting).

¹²² *See id.* (Stevens, J., dissenting).

¹²³ *See id.* (Stevens, J., dissenting). The majority was not convinced by this line of argument, noting that just because a third party *could* print out the *New York Times* by date, thereby preserving the collective nature of the work (a noninfringing document), does not mean that the database is not infringing. *Id.* at 518-19.

¹²⁴ 17 U.S.C. § 107 (1994). Some authors consider the applicability of the doctrine of fair use to be the defining characteristic of intellectual property, as compared to other property rights in tangible resources. *See* Dane S. Ciolino,

although technically forbidden by copyright law, will not be considered copyright infringement.¹²⁵ (Other legal systems contain comparable legal rules limiting the scope of copyright protection, such as the French “*droit de citation*” and the British right of “parody.”)

The statute provides limited guidance on what constitutes fair use, providing only an open-ended, non-determinative list of precedential factors: (1) the purpose and character of the use, including whether it is commercial or for non-profit educational purposes; (2) the nature of the copyrighted work itself; (3) whether the section used constitutes a substantial portion of the work as a whole; and (4) the effect of the use upon the potential market for, and value of, the copyrighted work.¹²⁶ The statute does not provide express instructions for weighing each of the elements but, rather, relies on courts to develop further the substance of the doctrine, as judges did prior to the 1976 codification.¹²⁷

Bringing up fair use in the *Tasini* context is interesting because, as a rule, when new technological advances in the dissemination of information conflict with the precepts of standard copyright law, the doctrine of fair use, which delineates limited circumstances under which the work may be

Rethinking the Computability of Moral Rights and Fair Use, 54 WASH. & LEE L. REV. 33, 56-57 (1997); see also Michael G. Anderson & Paul F. Brown, *The Economics Behind Copyright Fair Use: A Principled and Predictable Body of Law*, 24 LOY. U. CHI. L.J. 143, 158 (1993) (noting that fair use is a “necessary part of copyright law, the observance of which is essential to achieve the goals of that law”); Lydia Pallas Loren, *Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems*, 5 J. INTELL. PROP. L. 1, 4 (1997) (considering it to be critical to copyright’s fundamental purpose of promoting the progress of knowledge and learning: “[fair use is] one of the most important counterbalances to the rights granted to copyright owners”).

¹²⁵ The doctrine of fair use shares with mandatory licensing, reverse engineering, and prohibition of copyright misuse the common purpose of striking a balance between the veto right of the intellectual property rights holder and the public interest in dissemination of the work.

¹²⁶ 17 U.S.C. § 107 (1994).

¹²⁷ See H.R. REP. NO. 94-1476, at 66 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5680. As the House noted, “the endless variety of situations and combinations of circumstances that can arise in particular cases precludes the formulation of exact rules in the statute.” *Id.* The House Report further noted that “the courts must be free to adapt the doctrine to particular situations on a case-by-case basis.” *Id.* For an overview of the manner in which courts weighed the various individual factors up to 1982, see Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1604 (1982).

used without the author's permission, is called upon to reconcile the two. Although there is agreement that fair use is a potential tool, proponents of new technology and copyright holders generally favor narrowing the scope of the fair use defense.¹²⁸

Ironically, at the same time that fair use is seen as a way to reconcile technology and copyright issues, the mass popularization of the Internet and continued technological advances in information dissemination has produced a new argument that fair use will become obsolete in a world where one-click technology provides instantaneous communication between copyright holders and users. Universally accessible Internet gateways will allegedly provide copyright holders the opportunity to charge users of their works licensing fees in quasi-automatic fashion, eliminating the transaction-cost argument that provides one of the main pragmatic justifications of fair use. In turn—the argument goes—the traditional rationales for the existence of fair use doctrine will lose their persuasive power.¹²⁹

¹²⁸ Generally, the key role of fair use in resolving tension between new technology and traditional copyright is well appreciated. See Adrienne J. Marsh, *Fair Use and New Technology: The Appropriate Standards to Apply*, 5 CARDOZO L. REV. 635, 635-36 (1984) ("Successful resolution of the resulting tension between products of the new technologies and copyright law will depend largely on the doctrine of fair use.").

¹²⁹ See Tom W. Bell, *Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine*, 76 N.C. L. REV. 557 (1998) (arguing that fair use will, to a large extent, be replaced by "fared use," where automated rights management will become the dominant instrument for copyright transfer); Edmund W. Kitch, *Can the Internet Shrink Fair Use*, 78 NEB. L. REV. 880 (1999) (examining the potential effect of both a structural approach (i.e., denying fair use treatment when the copyright owner *could* have established Internet permission) and a transactional one (i.e., where fair use falters only in situations where Internet permissions *are* easily available) in leading to a reduced scope of fair use); Robert P. Merges, *The End of Friction? Property Rights and the Contract in the "Newtonian" World of On-Line Commerce*, 12 BERKELEY TECH. L.J. 115 (1997) (pondering the reduced role of fair use, while proposing a new, subsidy-oriented, foundation for the fair use doctrine that would better emphasize the doctrine's redistributive concerns); David Post, *Battle or Dance?*, 116 AM. LAW., Jan./Feb. 1996 (arguing that automated rights management techniques drastically reduce transaction costs of negotiating licence fees, thereby calling into question the role of fair use). But see Jonathan Dowell, Comment, *Bytes and Pieces: Fragmented Copies, Licensing, and Fair Use in a Digital World*, 86 CAL. L. REV. 843 (1998) (examining the prospect of fair use in the context of fragmented literal copying of small chunks of content, concluding that the cost-minimization

C. Fair Use and the Anticommons Dilemma

It appears, however, that the fair use doctrine might have further economic justification that has not been captured by the one-dimensional argument that the economic rationale for the fair use doctrine has been lost.¹³⁰ The tragedy of the anticommons demonstrates that fair use remains valuable even in the digital context of automated rights management. As Buchanan and Yoon suggest, the anticommons is a useful metaphor for understanding why potential economic value may “disappear into the ‘black hole’ of resource underutilization.”¹³¹ In light of the anticommons insight, fair use doctrine retains a valid efficiency justification even in a zero transaction cost environment. Fair use defenses can be regarded as justifiable and instrumental in minimizing the welfare losses occasioned by the strategic behavior of the copyright holders. Even if copyright licenses can be transferred at no cost (for instance, in a “click and pay” frictionless computer world), the strategic behavior of the copyright holders would still create possible deadweight losses that the fair use doctrine can mitigate.

Copyright owners, such as the freelancers in *Tasini*, will have complete control over their work, leading to veto power over its use. If substitute works are available, namely similar articles which convey the same information and point of view, the authors will simply be opting out of a market in which price is set at the competitive equilibrium. If, however, the authors hold control over works that are complementary to others (i.e., their contribution enhances that of others), then they can block access to these works, causing deadweight loss. Because they do not have any way to coordinate with other copyright owners, absent some sort of copyright clearinghouse, this could well lead to an anticommons situation.

In order to assess the extent of the anticommons problem, it is important to know whether the works of the freelance writers which are in question are strictly complementary to each other, or if it is possible to get substitutes for them. The unitary basis of the problem can be understood when thinking of the traditional structure of a property right, in which

function of automated licensing does not take into consideration the public benefit purpose of fair use).

¹³⁰ The briefs in preparation for the Supreme Court oral arguments do not mention fair use, but the amicus briefs do draw on the concept. See *infra* notes 135, 139 and accompanying text.

¹³¹ Buchanan & Yoon, *supra* note 76, at 2. Parisi, Schulz and Depoorter have explored the extent of such underutilization in different anticommons cases. See PARISI ET AL., *supra* note 36.

owners enjoy a "bundle of rights" which include, among other things, the right to use their property and the right to exclude others from it. In such a framework, the owner's dual rights are exercised over the same domain and are complementary. Whenever property is created or otherwise partitioned in such a way as to place complementary components of the property in the hands of different individuals, inefficiency may result and the discrepancy between the rights of use and the rights of exclusion held by the various owners is likely to produce welfare losses.¹³²

Ultimately, it is the readers and researchers of the future who will determine the extent of the anticommons problem in the *Tasini* case. For instance, Jonathan Tasini writes about labor disputes. If someone is content to know the basics about labor unions, it is likely that it will be possible to get the information in Mr. Tasini's articles elsewhere, thereby dissipating Mr. Tasini's bargaining power to secure additional copyright revenue from his work, as NEXIS would simply decline to include his pieces in its electronic collection. If, however, Mr. Tasini's work complements general information about labor unions, as it provides more in-depth analysis or specialized information, then Mr. Tasini has more bargaining power. Unfortunately, if the copyrights are in a relationship of complementarity in the production of a derivative work, namely desired in-depth elaboration of general current events, then it would lead to anticommons pricing, making both society and the individual copyright sellers worse off.¹³³

¹³² Furthermore, it has been suggested that problems of inefficient fragmentation (be they cases of insufficient fragmentation, such as the commons, or excessive fragmentation, such as the anticommons) are not confined to situations of insufficient or excessive fragmentation of real assets, but they can result from the dismemberment—and resulting nonconformity—between the internal entitlements of the property right. The qualitative results of these models represent limit points along a continuum, each characterized by different levels of discrepancy between use and exclusion rights, with welfare losses varying accordingly. PARISI ET AL., *supra* note 36, at 6; *see also* Heller, *supra* note 34.

¹³³ The anticommons equilibrium pricing is, in fact, the outcome of a prisoner's dilemma problem that the individual copyright sellers face when pricing their copyrights independently from one another. As in a traditional prisoner's dilemma game, the inability of copyright holders to coordinate prices produces a result that is both privately and socially inefficient. Quite strikingly, in this case the competitive outcome is socially inefficient, even if compared to the alternative monopoly equilibrium. Competitive pricing of the complementary goods generates a substantially larger social loss than the monopolistic equilibrium.

If the copyrights are substitutes in the production function of the derivative work, the inability of the copyright sellers to coordinate their prices will also be detrimental for them. Unlike the complementarity case considered above, however,

D. Fair Use and the Selective Use of Remedies in Copyright Protection

In most legal systems, copyright law provides a copyright holder a vast choice of remedies against infringement of his work, including property-type remedies (e.g., injunctions to restrain the infringer from violating his rights or even the impoundment and destruction of the unauthorized reproductions of his work) and liability-type remedies (e.g., actions to recover the actual damages and to disgorge the additional profits realized by the copyright infringer or to collect statutory damages). In the United States, all of the above choices of remedies are made available by the Copyright Act, which also provides that, in a civil action for copyright infringement, a court may grant temporary and final injunctions to prevent or restrain infringement of a copyright.¹³⁴ It is to this range of choice that those supporting the Respondents turn in order to find a solution to the present dilemma.

The results of this Article suggest that a selective use of remedies may be appropriate to minimize the effect of fragmentation and strategic pricing. As a matter of ideal theory, anticommons losses will result from the imposition of property-type remedies (i.e., injunctions). If copyright owners are given only a damage remedy for the infringement of their work, there is no opportunity for strategic pricing and thus no anticommons deadweight loss. If liability-type remedies are limited, the infringer has considerable leverage with the copyright owner because he always has the option to use without permission and pay damages. Under a liability rule, the prospective buyer of a copyright license could not be induced to pay more than the cost of his expected liability for copyright infringement. At the limit, a copyright holder can obtain a judicial declaration of his rights, but the defendant can persist in the violation simply by paying damages. In contrast, in the case of property-type (i.e., injunction) protection, a copyright license can be obtained only if the current owner agrees to sell it at the price he demands. Absent such agreement, an owner could obtain an injunction to enforce his rights upon proof of a valid copyright. Under such a regime, strategic pricing of multiple complementary copyrights could lead to substantial dissipation of value.

the competition among copyright sellers would be beneficial for society at large. In this case, in fact, the substitutability of the copyrights as inputs of production leads to the usual negative price effect. The resulting equilibrium—albeit Pareto inferior for all the players—is socially preferable to the alternative monopoly outcome.

¹³⁴ 18 AM. JUR. 2D *Copyright and Literary Property* § 221 (1985).

In fact, opting for a liability-type remedy is precisely the kind of solution suggested by the American Library Association ("ALA") in its amicus brief to the Court. Recognizing that providing an injunction would cause complications in terms of negotiating use with each author, the ALA argued that the "courts and/or the parties can devise and administer a system of monetary relief to compensate freelance authors for past acts of copying and distribution of their works and pay them continuing royalties for future use of their works."¹³⁵ As a justification for this approach, the ALA cited *Campbell v. Acuff-Rose Music, Inc.*,¹³⁶ in which the Court stated that "the goals of copyright law are not always best served by automatically granting injunctive relief."¹³⁷ In that case, the defendant's argument that his parody was protected by fair use was not so unreasonable as to warrant an injunction. The Court recognized a public interest in maintaining access to the defendant's work.¹³⁸ The ALA argued that the same rationale should be used in *Tasini*.¹³⁹ Presumably because electronic databases meet some of the fair use criteria (e.g., educational purpose), the appropriate solution would be to attach a price to the use of the material rather than prevent access to it altogether. The *Tasini* majority picked up on the argument, citing *Campbell* when remanding the case, a hint that it would provide appropriate guidance in crafting the ultimate remedy.¹⁴⁰ As Professor Mark Lemley points out, one might prefer compulsory licensing as a means for solving the anticommons problem since, if fair use prevails, the copyright owner cannot recover any money for the use. The drawback is that the administrative costs of compulsory licensing have made people reluctant to embrace the approach. Professor Lemley responds, however, that (1) litigating the fair use issue almost certainly costs no more than compulsory licensing and (2) copyright law has a lot of compulsory licenses already, and they seem to be administered reasonably well through arbitration panels or private settlement.¹⁴¹ Even though a broad fair use doctrine may

¹³⁵ Brief of Amici Curiae American Library Ass'n and the Ass'n of Research Libraries at 4, *New York Times Co. v. Tasini*, 533 U.S. 483 (2001) (No. 00-201).

¹³⁶ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

¹³⁷ *Id.* at 578 n.10.

¹³⁸ *Id.*

¹³⁹ Brief of Amici Curiae American Library Ass'n and the Ass'n of Research Libraries at 13-14, *New York Times v. Tasini*, 533 U.S. 483 (2001) (No. 00-201).

¹⁴⁰ *New York Times Co. v. Tasini*, 533 U.S. 483, 519 (2001).

¹⁴¹ For an argument that we ought to abolish both fair use and all injunctions in copyright cases, thus making everything a compulsory license, see Alex Kozinski & Christopher Newman, *What's So Fair About Fair Use?*, 46 J. COPYRIGHT SOC'Y 513 (1999). For another solution to the anticommons problem, Professor Robert

discourage litigation of clear-cut cases, a broad compulsory licensing system may still necessitate adjudication.

The lesson to be drawn, therefore, is that legal systems should not change the scope of the fair use defense or the choice of remedy in case of infringement, even with decreasing transaction costs in an increasingly electronic marketplace. Rather, the doctrine of fair use should be a bridge between traditional copyright enforcement and protection in the Digital Age. Leaving both the scope of fair use and the arsenal of copyright remedies unchanged could minimize anticommons losses; conversely, a reduction in the scope of fair use defenses might have the effect of increasing them. In such a case, the use of liability-type remedies in the new domains of copyright protection would help contain the deadweight losses from strategic pricing.¹⁴² As *Tasini* demonstrates, this scenario is far from theoretical.

V. CONCLUSION

Viewing property law through the lens of economic analysis highlights the difficulties associated with balancing economic efficiency with the realities of high transaction costs and other situations in which the various actors involved are precluded from reaching an efficient agreement. Understanding the tendency towards entropy and the characteristics of an anticommons situation sheds light on why the common law has developed

Merges has considered collective rights organizations, in which disparate rightholders organize into blanket licensing societies. Robert P. Merges, *Contracting Into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CAL. L. REV. 1293 (1996).

¹⁴² The above prediction is consistent with the observation of remedies in real property, where the limited protection given to atypical (or innominate) rights still characterizes the modern day law of remedies in both common law and civil law jurisdictions. Parisi, *supra* note 28. Professors of property law often cite this fact as one of the many unexplained puzzles of their field, assuming that availability of liability-type remedies for certain categories of real rights is merely coincidental. *Id.* In a popular textbook on property, Dwyer and Menell observe that “[b]ecause of one of the many historical accidents that plague property law, real covenants are enforced by a damages remedy only.” JOHN P. DWYER & PETER S. MENELL, *PROPERTY LAW AND POLICY: A COMPARATIVE INSTITUTIONAL PERSPECTIVE* 760 (1998). We suggest that these anomalies are not merely happenstance, given the existence of strategic impediments in the reunification of fragmented rights. In the intellectual property context, these strategic impediments are most pervasive in cases of production or consumption complementarities.

certain rules and how these norms, which may be initially puzzling, are in fact effective responses to potentially difficult questions. Courts are beginning to use these concepts as practical tools in resolving cases. As demonstrated by the *Tasini* case, anticommons analysis, in particular, illuminates the way to crafting a judicial remedy that will be faithful to the letter of the Copyright Act and will avoid collateral damage in terms of restricting access to a vast and important store of information. In particular, anticommons theory demonstrates that the doctrine of fair use, far from being obsolete, has promise as an important bridge between traditional and digital copyright protection.